Advance Auto Parts Distribution Center *and* United Steelworkers of America, AFL–CIO, CLC. Cases 10–CA–28714, 10–CA–28966, and 10–CA–29170

January 23, 1997

DECISION AND ORDER

BY CHAIRMAN GOULD AND MEMBERS FOX AND HIGGINS

On August 15, 1996, Administrative Law Judge Albert A. Metz issued the attached decision. The Respondent and the General Counsel filed exceptions and a supporting brief, the Respondent filed an answering brief to the General Counsel's exceptions, and the General Counsel filed a response to the Respondent's answering brief.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the decision and the record in light of the exceptions and briefs, and has decided to adopt the judge's rulings, findings,[1] and conclusions and to adopt the recommended Order.[2]

We find that the judge's analysis of Genean Baker's discharge is consistent with the test for unlawful motiviation set forth in *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982). In sum, the judge found a prima facie case of discriminatory conduct and considered and rejected as pretextual the Respondent's proffered defenses of legitimate motivation. See *T&J Trucking Co.*, 316 NLRB 771, 771–772 (1995); *Garney Morris, Inc.*, 313 NLRB 101, 102 (1993); *Limestone Apparel Corp.*, 255 NLRB 722 (1981).

We also agree with the judge that the Respondent did not violate Section 8(a)(3) of the Act by eliminating the quality control department at its Gadsden, Alabama plant by disciplining two of the quality control employees, or by changing working conditions for the employees in that department. Even assuming the General Counsel established a prima facie case that the employees' protected conduct was a motivating factor in the Respondent's decision to take those actions, the judge implicitly found that the Respondent carried its *Wright Line* burden of demonstrating that it would have taken those actions in the absence of protected conduct.[3] The judge clearly viewed the Respondent's proffered business reasons for changing working conditions and, later, for eliminating the quality control department as reasonable and valid; indeed, he specifically noted that the Respondent also eliminated the quality control department at its Roanoke, Virginia facility, where no union activity was shown to have taken place. The judge also found that the suspension of Greg Wilson was similar to discipline meted out to other employees for similar infractions, and the record establishes that the same is true with regard to the warning to Janice Treckey. We therefore adopt the judge's recommended dismissal of these allegations.

ORDER

The National Labor Relations Board adopts the recommended Order of the administrative law judge and orders that the Respondent, Advance Auto Parts Distribution Center, Gadsden, Alabama, its officers, agents, successors, and assigns, shall take the action set forth in the Order, except that the attached notice is substituted for that of the administrative law judge.

APPENDIX

NOTICE TO EMPLOYEES
POSTED BY ORDER OF THE
NATIONAL LABOR RELATIONS BOARD
An Agency of the United States Government

The National Labor Relations Board has found that we violated the National Labor Relations Act and has ordered us to post and abide by this notice.

Section 7 of the Act gives employees these rights.

To organize
To form, join, or assist any union
To bargain collectively through representatives of their own choice
To act together for other mutual aid or protection

[1] The Respondent has excepted to some of the judge's credibility findings. The Board's established policy is not to overrule an administrative law judge's credibility resolutions unless the clear preponderance of all the relevant evidence convinces us that they are incorrect. *Standard Dry Wall Products*, 91 NLRB 544 (1950), enfd. 188 F.2d 362 (3d Cir. 1951). We have carefully examined the record and find no basis for reversing the findings.

[2] We have modified the administrative law judge's notice to conform to his recommended Order.

[3] The judge found that the Respondent had demonstrated antiunion animus and that it knew that the three quality control employees supported the Union. Although the timing of the Respondent's actions—nearly 3 months after the representation election—weakens somewhat the inference that those actions were unlawfully motivated, the judge found that the elimination of the quality control department "was not so isolated in time as to insulate the act from consideration as a violation of the Act." The judge thus apparently found a prima facie case with regard to the elimination of the quality control department; the same elements would establish a prima facie case with respect to the other actions as well.

In adopting the judge's dismissal of these allegations, we do not rely on his statements regarding Baker's discharge and the elimination of the Gadsden quality control department implying that the test for deciding 8(a)(3) allegations is whether the employer's decision was motivated in significant part by union considations. In *Wright Line*, the Board held that a prima facie case is established when the General Counsel makes a showing sufficient to support the inference that protected activity was a "motivating factor" in the employer's decision. 251 NLRB at 1089.

To choose not to engage in any of these protected concerted activities.

WE WILL NOT threaten employees that we will not allow the United Steelworkers of America, AFL–CIO, CLC or any other union to represent them.

WE WILL NOT threaten employee that we will close or move the facility and the employees will lose their jobs if the Union represents them.

WE WILL NOT interrogate our employees about their union sympathies or activities.

WE WILL NOT create the impression that we are surveilling our employees' union activities.

WE WILL NOT tell employees they can not distribute union literature or talk about the Union on company time or property.

WE WILL NOT direct employees to remove union buttons they wear at work.

WE WILL NOT threaten employees that those who wear union buttons will be closely watched by supervision.

WE WILL NOT solicit employees' grievances and promise to rectify such grievances if they vote against union representation.

WE WILL NOT require our employees to display antiunion signs or disparately prevent them from displaying prounion signs.

WE WILL NOT discharge our employees because they engage in union activities.

WE WILL NOT in any like or related manner interfere with, restrain, or coerce you in the exercise of the rights guaranteed you by Section 7 of the Act.

WE WILL, within 14 days from the date of the Board's Order, offer Genean Baker full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

WE WILL make Genean Baker whole for any loss of earnings and other benefits resulting from her discharge, less any net interim earnings, plus interest.

WE WILL, within 14 days from the date of the Board's Order, remove from our files any reference to the unlawful discharge of Genean Baker, and WE WILL, within 3 days thereafter, notify her in writing that this has been done and that the discharge will not be used against her in any way.

ADVANCE AUTO PARTS DISTRIBUTION CENTER

Karen N. Neilsen, Esq., for the General Counsel.
Doug Henson, Esq. and *Bayard Harris, Esq.*, of Roanoke, Virginia, for the Respondent.
Billy Williamson, of Gadsden, Alabama, for the Charging Party.

DECISION

INTRODUCTION

ALBERT A. METZ, Administrative Law Judge. This case was heard at Birmingham, Alabama, on May 20–22, 1996.[1] The United Steelworkers of America, AFL–CIO, CLC (the Union) has charged that Advance Auto Parts Distribution Center (the Respondent) violated Section 8(a)(1) and (3) of the National Labor Relations Act (the Act).[2]

The Respondent admits that it is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act and that the Union is a labor organization within the meaning of Section 2(5) of the Act.

I. BACKGROUND

The Respondent operates over 600 retail automobile parts stores. It has a distribution center (DC) in Gadsden, Alabama, that services part of these stores. Another warehouse is located in Roanoke, Virginia. In the spring of 1995 the Union commenced an organizational campaign at the Gadsden DC. An election petition was filed by the Union on June 7 and a representation election was held on July 21. The Respondent won the election by a vote of 132 to 38.

II. ALLEGED UNFAIR LABOR PRACTICES

A. *The 8(a)(1) Allegations Concerning Glenn Pentecost*

Former employee Glenn Pentecost was discharged by the Respondent on approximately July 1 because of a policy against relatives working together at the DC. Pentecost testified that he was distributing union literature with fellow employee Al Yates a few weeks prior to his discharge. Both employees had just started wearing union buttons at work. They were approached by Supervisors Chuck Muscleman and Rudy Culpepper. Muscleman said that he could not do anything about the employees wearing their union buttons but they could not distribute any literature or talk about the Union on company time or company property anymore. Pentecost said he knew his rights and he could pass out union materials on breaks, lunch, and before and after work. Muscleman disagreed with this statement but finally said he guessed that Pentecost knew his "stuff" and he left the area.

Pentecost's testimony is uncontroverted. I credit Pentecost's testimony of the encounter and find Muscleman's statements of restrictions concerning union literature and discussions are a violation of Section 8(a)(1) of the Act.

Pentecost testified that he also had a conversation with Supervisor Butch Farless prior to the election. Farless stated that he had been told by Supervisor Wayne Weems that Weems was watching the employees who were wearing "Union Yes" buttons "real close." Pentecost's testimony was uncontroverted, however, the Respondent objects to it as hearsay. As Farless and Weems are both admitted supervisors and agents of the Respondent the testimony was not hearsay. The statement was an admission by an agent. Federal Rules of Evidence 801(d)(2)(D). Supervisor Farless'

[1] All subsequent dates refer to 1995 unless otherwise indicated.

[2] The Government withdrew the following paragraphs of the complaint: 9, 14, 15, 18, 20, 21 (8(a)(1) allegations), 27 and relevant parts of 33 (8(a)(3) allegations concerning the discharge of Earl McConnell).

threat that union supporters were being more closely watched is found to be a violation of Section 8(a)(1) of the Act.

B. *The 8(a)(1) Allegations Concerning Genean Baker*

1. June telephone call

As detailed below, the Respondent told Genean Baker on July 24 that she was discharged for excessive unexcused absenteeism. Baker testified to several instances of alleged 8(a)(1) violations preceding her discharge. In the first incident, which assertedly occurred in June, Baker called Supervisor Lance Hunt to report she would be absent from work. Baker recalled that during their conversation Hunt asked her what she thought about the Union. Baker related a "bad experience" she had with a union at a prior place of employment. Hunt told her, "[T]hat if the Union got in, that the place was gonna shut down." Hunt also told her that he was a single parent raising two boys. He noted that many of the Respondent's employees were also single parents and he would hate to see them out of a job.

Hunt recalled a short telephone conversation with Baker when she called to report her absence. He testified that he told her that she should talk to her immediate supervisor and denied ever discussing the Union with her.

Baker's testimony was detailed and her demeanor sincere. I credit her over Hunt whose demeanor and denial were not persuasive. The Respondent violated Section 8(a)(1) of the Act by interrogating Baker concerning her union sympathies and threatening that it would close the DC if the Union won representation rights.[3]

2. Three July conversations with Cheatwood

Baker testified that 1 day in July she was wearing about 12 union buttons while at work. Supervisor Matt Cheatwood saw them and asked if she had enough buttons on. Then Cheatwood directed her to remove some of the buttons.

Cheatwood denied that he ever asked Baker to remove any union buttons she was wearing. He did admit that early in the union campaign there had been a company policy against wearing more than a certain number of union buttons. Cheatwood recalled that the policy was later changed so there was no restriction on the number of buttons that could be worn.

Absent special circumstances an employer may not restrict the wearing of union insignia. *Mack's Supermarkets*, 288 NLRB 1082, 1098 (1988). The Respondent denied the incident happened and asserted no special circumstances existed requiring a restriction. Considering the demeanor of these two witnesses and Cheatwood's admission that at one time a restriction was placed on the wearing of buttons, I credit Baker's version of the incident. I find that Cheatwood's directive to Baker to remove some union buttons was a violation of Section 8(a)(1) of the Act.

Baker testified that a short time after the above conversation she had another discussion with Cheatwood. She was driving a cherry picker machine where someone had placed a sign that read: "Vote yes to the union, vote yourself out of a job." Baker had modified the sign to state: "Vote yes to the union, vote yourself to a better job." Cheatwood noticed the alteration and asked why she had changed the sign. Baker said she was not going to drive around with the antiunion sign on her machine. Cheatwood told her to put the antiunion sign back on or get off her machine. She took the sign off her machine and went to break. On her return the antiunion sign was once again on her cherry picker. Baker then continued to drive her machine beating the antiunion sign.

Cheatwood denied that he told Baker to remove her prounion sign or to get off of her machine. He further stated that it would be counterproductive to remove Baker from her assignment as this would reduce the number of orders that could be pulled.

Baker was direct and convincing in her testimony regarding the incident. Cheatwood was not impressive in his demeanor when he denied the conversation ever took place. I credit Baker that she was required to display the antiunion sign in the work place against her will and disparately prohibited from displaying a prounion sign. This conduct is a violation of Section 8(a)(1) of the Act.

Genean Baker testified that on approximately July 19 she was changing the battery on her cherry picker. Cheatwood was helping her and a security guard was also present. The guard noticed Baker's union buttons and asked her if she was going to vote yes in the election. Baker told him she was. The guard said that one of the guys in the Union said if the Union won the election "they" were going to request that the women not be paid the same as men. Baker dismissed this statement. Cheatwood spoke up, "Well it don't matter 'cause if the union gets in, the place is gonna shut down. . . . You can tell by all the merchandise in here, we're not receiving anything in. . . . What we'll do is we'll ship everything out that's in here until after the vote, and then if they don't get in, then we can ship other items in." Cheatwood denied ever telling Baker that the DC would shut down.

Baker's detailed testimony of the incident contrasts sharply with Cheatwood's general denial. Considering the demeanor of the two witnesses I credit Baker's testimony. The Respondent's threat to close the facility if the Union represented the employees is a violation of Section 8(a)(1) of the Act.

3. Conversation with Hunt

Baker testified that during the union campaign she had a conversation with Lance Hunt. Hunt told her that the Respondent was going to beat the Union. Hunt then asked Baker what had gone on at the latest union meeting. He also asked her if she was still going to vote "no" in the election. Baker told him she had never said she was going to vote against the Union. Hunt denied he ever had any conversation

[3] The Government presented evidence of a similar threat that Hunt made that was not alleged as a violation of the Act. Counsel for the General Counsel did not move to amend the complaint and the Respondent did not object to the testimony. The Respondent did not cross-examine or present its own witnesses on the conduct. Likewise the Respondent did not address the matter in its posthearing brief. Although the matter is closely related to the conduct alleged in the complaint, it was not fully litigated. See generally *Hi-Tech Cable Corp.*, 318 NLRB 280 (1995). In any event, a finding of a violation of the Act based on this conduct would be cumulative. However, this incident, and similar unalleged conduct cited in the Government's brief, have been considered in relation to the record as a whole for such matters as animus, timing, knowledge, motivation, and background. (G.C. Br. pp. 10, 11, 16, 19, 23 and 24.)

with Baker where he asked her about union meetings or how she was going to vote in the election.

Baker's demeanor when reciting this incident was believable. Hunt was not persuasive in his demeanor and his general denial. I credit Baker and find that Hunt's interrogation and his creation of the impression of surveillance of Baker's union activities were a violation of Section 8(a)(1) of the Act.

4. Taubman's employee meeting

Baker testified that on July 20 she attended a meeting at the DC conducted by the Respondent's owner, Nick Taubman. Baker recalled that Taubman told the employees that the Respondent had never had a union and it would not have one. He stated that he could not tell the employees that the Respondent would shut down but he could move the operations if the Respondent were not making money.

Employee Janice Treckey also remembered a speech by Taubman shortly before the election. (This was apparently a different occasion as Treckey worked days—a different shift than Baker.) Treckey recalled Taubman saying in that meeting he would not permit intervention by a third party at the DC. The Respondent did not call Taubman to testify at the hearing.

I find that Taubman's unrefuted threat that the Respondent would never allow a union to represent them is unlawful. Further, Taubman's uncontroverted remarks about moving the operations is likewise found to be unlawful. In the context of his other remarks such a statement was a thinly veiled threat to close the DC because of the Union. Taubman's threats are a violation of Section 8(a)(1) of the Act.

5. Offer to pay Baker for taking questionnaire to union meeting

The Government cites an additional incident involving Baker that is not alleged as a violation of the Act. Baker testified that 1 to 2 weeks prior to the election she was approached by Supervisor Cheatwood. He had a questionnaire which concerned the Union. Cheatwood offered Baker $20 if she took the document to union meetings and got all the questions answered. Baker asked Cheatwood how he knew she was attending union meetings. Cheatwood denied having such a conversation with Baker. He did, however, recall telling a group of employees he bet $20 that no one could take the questions to the Union and get them answered. He did not remember Baker being present at that time. Based on the demeanor of the two witnesses and Cheatwood's acknowledgment of discussing the subject with employees, I credit Baker that the incident happened as she stated.

C. *Discharge of Genean Baker*

On July 20 the Respondent discharged Baker. The Respondent alleges she was terminated because she did not provide a doctor's excuse for an absence and thus incurred a final unexcused absence requiring her discharge under the Respondent's policy.

Baker received a warning on June 14 that she had six unexcused absences in a 2-year period and if she had one more she would be terminated. Baker's son was ill on July 16, a Sunday evening. She called the Respondent around 11:30 p.m. and reported that she was taking the child to the emergency room. She did not work her July 17 shift of 12 midnight to 8 a.m. The next day she called in again at around 11:30 p.m. and reported that she would not be able to report for that night's shift either as her son had not been released from the emergency room.

On July 19 Baker reported to work for her shift and brought a doctor's excuse dated July 17 which states that, "Mother needs to stay home with child." Her supervisor, Dale Sawyer, pointed out to her that she did not have a doctor's excuse for the July 18. When she offered to take the excuse to the hospital and get the matter straightened out Sawyer told her to start work and Supervisor Hunt would contact the hospital. Baker worked her shift on July 19.

On July 20 Baker attended the meeting described above where the Respondent's owner, Taubman, threatened the employees with closing the DC and never allowing the employees to have union representation. After that meeting she was called into Supervisor Hunt's office. Baker was chastised by Hunt for not paying attention in the meeting. Hunt then told her because she did not have an excuse for her July 18 absence she was being suspended. Baker asked if she obtained a doctor's excuse for July 18 could she return to work. Hunt told her she could.

Baker waited outside for her ride to pick her up that night. When the person came to pick her up Baker found a copy of her son's emergency room discharge sheet in the car. This document states her son was free to return to school on July 19. Baker thought this was a sufficient document to excuse her absence of the July18. She showed the paper to the guard at the entrance gate. He called Hunt and came back to Baker. The guard told her that he did not know what she had done but, "They don't want you back inside the gate." He said that Hunt wanted a copy of the document and that he would call her. Supervisor Cheatwood came to the gate, had a copy made, and told Baker that Hunt would call her.

The next day Baker went to the DC to vote in the election. She was escorted to the voting area by a guard. Her name had been marked off the voting list with a notation she was terminated. Baker voted under challenge and then was escorted off the premises.

On July 24 Hunt called Baker at her residence to inform her of her discharge. Baker's mother, Barbara Baker, answered the phone and summoned her daughter to speak with Hunt. Genean remembered Hunt saying that the union vote "went down." He told Genean Baker that he had found out she did not take her son to the emergency room until late evening on July 17. Hunt made the point that Baker could have worked her shift. Baker explained that she did not have anyone to watch her son at the time and in any event her excuse covered July 17. Baker told Hunt that she thought her discharge was just an excuse because of the Union. According to Baker, Hunt stated, "Well, you shouldn't have been for the Union."

Barbara Baker testified that she went into the bedroom as her daughter talked to Hunt. At one point she picked up the phone in the bedroom to make a call because she thought her daughter was off the phone. Barbara Baker states she overheard Hunt make the statement that her daughter should not have been for the Union.

Hunt testified that he did telephone Genean Baker and informed her of the discharge. He denied that he made any statement to her about her support for the Union.

The demeanor of the Bakers was persuasive compared to that of Hunt when he denied mentioning the Union to Genean. I credit the womens' testimony over that of Hunt and conclude that he did tell Genean she should not have been for the Union.

D. *Analysis of Baker's Discharge*

The General Counsel has the initial burden of establishing that union or other protected activity was a substantial or motivating factor in the Respondent's action alleged to constitute discrimination in violation of Section 8(a)(3). The elements commonly required to support such a showing of discriminatory motivation are union activity, employer knowledge, timing, and employer animus. Once such unlawful motivation is shown, the burden of persuasion shifts to the Respondent to prove its affirmative defense that the alleged discriminatory conduct would have taken place even in the absence of the protected activity. *Wright Line*, 251 NLRB 1083 (1980), enfd. 662 F.2d 899 (1st Cir. 1981), cert. denied 455 U.S. 989 (1982); approved in *NLRB v. Transportation Management Corp.*, 462 U.S. 393 (1983); *Manno Electric*, 321 NLRB 278 (1996).

The test applies regardless of whether the case involves pretextual reasons or dual motivation. *Frank Black Mechanical Services*, 271 NLRB 1302 fn. 2 (1984). "A finding of pretext necessarily means that the reasons advanced by the employer either did not exist or were not in fact relied upon, thereby leaving intact the inference of wrongful motive established by the General Counsel." *Limestone Apparel Corp.*, 255 NLRB 722 (1981), enfd. sub nom. 705 F.2d 799 (6th Cir. 1982); *T&J Trucking Co.*, 316 NLRB 771 (1995). See also *Garney Morris, Inc.*, 313 NLRB 101, 102 (1993).

Baker was an open union supporter and as detailed above the Respondent had knowledge of her union sympathies. Likewise, the Respondent's violations of the Act as set forth here, including the incidents involving Baker, show the Respondent's union animus. The timing of Baker's discharge was contemporaneous with her union activity and immediately preceded her voting in the election. Thus, the General Counsel has established the foundational requirements supporting its theory that Baker's discharge resulted, in part, because of her union activities.

Baker did not contest that she was at the limit of her unexcused absences.[4] She contends, however, that she supplied reasonable written excuses for July 17 and 18 and that Hunt's remarks in his phone call show the antiunion motive behind her discharge.

Hunt told Baker when she returned to work that she needed an additional excuse for July 18 and if she obtained it she could return to work. She then submitted the emergency release form to cover that date. This was not discussed with her and she was not permitted back on the Respondent's premises that night. The Respondent did not tell her that her emergency room release was deficient or give her an opportunity to supply supplemental medical excuses. She was immediately fired but not notified of her discharge until 4 days later.

The Respondent's brief points out that Baker did not take her son to the emergency room until after her shift on July 17. Thus, its position is that this "provided an after-the-fact excuse for July 18, 1995, but could not and did not excuse her for the initial absence of July 17, 1995." (R. Br. 35.) The Respondent does not dispute that Baker's son had a medical condition that required his receiving treatment at the hospital emergency room. The Respondent does explain why Baker was not given the opportunity to supply additional medical support for her absence before she was discharged.

I do not credit Hunt's denial that he told Baker she should not have been for the Union when he discharged her. Both Baker and her mother were credible witnesses. Hunt's demeanor and general denial that he made the statement were not convincing. The termination of Baker was a "rush to judgment" that vacillated between her first being told she needed an excuse for July 18 and then being condemned without a chance to respond for not having a sufficient excuse for July 17. These events occurred against the background of the 8(a)(1) violations that directly effected Baker. I find that the Respondent's reasons advanced for Baker's discharge were a pretext. The Respondent has failed to convincingly overcome the Government's case that this discharge was motivated, at least in significant part, by Baker's union activities. The Respondent violated Section 8(a)(1) and (3) of the Act when it discharged Genean Baker on July 20.

E. *The 8(a)(1) Allegations Concerning Lanny Kitchens*

Employee Lanny Kitchens recalled that prior to the election he was called into Supervisor Lance Hunt's office. Hunt asked him if he thought the Union had a good chance to go through. Kitchens said he thought that it did. Hunt replied, "Well, you know Nick Taubman [the Respondent's owner]." Kitchens asked Hunt if he thought that Taubman would shut down the DC. Hunt replied that there was a possibility he may and there was a possibility he may not. "You know, he's got enough money to do just about what he wants to."

Hunt did admit to discussing the possible shut down of the DC. Hunt recalled stating about a possible shut down that things had to be negotiated and that he could not say what would happen.

I credit Kitchens' version of that Hunt speculative threat that Taubman may shut down the DC because of the Union.[5]

[4] During Supervisor Hunt's testimony on behalf of the Respondent certain absence/tardy records were identified. Counsel for the General Counsel objected to the introduction of the records as she had subpoenaed such documents and the Respondent had not produced them. The Respondent argued that these records were maintained by Hunt, and he was not the person who controlled the remainder of the subpoenaed documents that had been presented to the General Counsel. I rejected this argument and ordered the absence/tardy records be given to the Government. The Government's subpoena was addressed to the Custodian of Records. I found that this form of address is sufficient to require the production of the requested documents in the possession of the Respondent—regardless of which company employee may physically retain the records. The Respondent promptly complied with the order to produce the records. Counsel for the General Counsel was given a full opportunity to examine and make use of the absence/tardy documents.

[5] Although I credit part of Kitchens' testimony, it is noted below that other segments of his testimony are not credited. *Edwards Transportation Co.*, 187 NLRB 3 (1970).

This threat is found to be a violation of Section 8(a)(1) of the Act.

Kitchens also recalled a conversation he had with Supervisor Mark Fonner when he and fellow employee Bubba McConnell were working in the oil aisle at the DC. Fonner said that it would be wise to vote the Union out and give the Respondent another chance. Kitchens remembered Fonner saying that Taubman had plenty of money and there was a possibility that the DC could shut down or relocate.

Fonner denied Kitchens' version of their discussion. He testified if he had a conversation with Kitchens it would have amounted to no more than handing him a fact sheet about the Union and asking him if he had any questions.

Fonner's demeanor was not convincing when he denied the incident did not happen. Kitchens was unequivocal and believable in his testimony of the conversation and he is credited in this instance. Fonner's statements were a threat that selecting the Union could lead to the closure of the DC. Additionally, Fonner's appeal to give the Respondent another chance in the context of this conversation is an implied promise to rectify the employees' grievances with the Respondent in exchange for their voting against the Union. Both statements are found to be violations of Section 8(a)(1) of the Act.

F. *Discharge of Lanny Kitchens*

Lanny Kitchens was first employed by the Respondent on April 27, 1994. He was discharged on October 10, 1995. The Respondent asserts that Kitchens' termination resulted from his improper use of worktime. The Government alleges the discharge resulted from Kitchens' union activities.

Kitchens' and the Respondent's witnesses disagreed on exactly what occurred regarding his disciplinary history and actions leading up to his discharge. The following is a summary of the credited testimony and record concerning Kitchens' disciplinary history: May 30—Did not go back to work area after break. He did not pull any store orders 25 minutes after break was over. June 13—Kitchens provided a required doctor's slip for leaving work early on June 8. The excuse was dated June 6 and stated he received care on June 6. The Respondent investigated the discrepancy and found that Kitchens did not see a doctor on June 8 and lied about the matter until confronted with the facts. Kitchens was then suspended from June 14 through June 20 for his actions. Kitchens was warned that further such behavior could result in discharge. July 25—Kitchens received a disciplinary notice for excessive absenteeism and a warning that two more absences in the year would result in his termination. September 1—Disciplinary notice for unexcused tardiness and a warning that four more unexcused tardies would result in termination. September 5—Disciplinary notice for unexcused absenteeism and a warning that one more unexcused absence would result in his termination. October 5—Disciplinary notice for unexcused tardiness.

On October 9 Kitchens was allegedly not in his work area some 7 minutes after his break was over. This was reported to Supervisor Hunt. In a second instance at approximately 10 a.m. Kitchens was observed by Supervisor Jane Spraley talking to employees Janice Treckey and Kerry Gowens at the end of the packing line. Spraley reported the incident to Supervisor Hunt who checked Kitchens' records. He determined that the two incidents amounted to Kitchens third improper use of time on the job violation. In addition Hunt concluded that Kitchens' poor record as outlined above were sufficient to justify his discharge. On October 10 Kitchens was discharged but eligible for rehire.

The Respondent cited examples of similar treatment of two other employees, Sandra Nichols and Dee Camper on October 6. They were observed misusing their time and both were given 3-day suspensions and disciplinary warnings. Likewise on January 27 Sharron Thomas received a warning for misuse of time and was sent home for the rest of the day. On June 27 John Tinker talked on the phone for 20–25 minutes while he should have been working. He received a written warning and 1-day suspension.

G. *Analysis of Kitchens' Discharge*

Kitchens was a union supporter. His participation included attending union meetings, wearing union buttons, speaking to fellow employees in support of the Union, and handing out union literature in the employee breakroom. Kitchens saw several supervisors observe his distribution of the union literature. As discussed above the Respondent's violations of the Act show a union animus. The timing of Kitchens' discharge was several weeks after the July 21 election but at a time when the Union continued its interest at the DC by filing charges with the National Labor Relations Board (NLRB).

Kitchens' memory of some of the instances cited for his discharge was cloudy. He denied seeing some of the disciplinary paperwork associated with his alleged misconduct. In general he was not persuasive in his demeanor that he was accurately remembering the events.

The Respondent introduced evidence of discipline issued to other employees for similar infractions. The Government points out the inconsistent nature of some of these disciplines. In sum, the Respondent did establish that it punished employees for what it viewed as wasting company time. Kitchens' employment history was shown to be spotted with other disciplines. The supervisors credibly testified to the fact that they considered he was abusing company time and I do not credit his denial to the contrary. I find that the Government has failed to prove by the required preponderance of the evidence that Kitchens' termination was a pretext or in part motivated by his earlier union activity.

H. *Background Concerning the Quality Control Department*

Employees Sharon Nichols, Janice Treckey, and Greg Wilson were the three employees working in the quality control department at the DC. They all engaged in union activity during the preelection campaign. This included signing authorization cards, attending meetings, and talking to fellow employees about supporting the Union. Additionally, Wilson wore a union sticker at work and passed out union literature.

The quality control department (QC) was created in the spring of 1995 and these three employees were told by supervisors that the department was likely to expand. The undisputed evidence shows that all three did excellent work and were complimented by management on continuously exceeding their production goals. The department was created in order for management to check on the accuracy of the pullers at the DC in filling orders. The Respondent asserts that after

analyzing the data accumulated by the QC employees it was determined that this information was no longer useful. The decision was then made to abolish the QC department at Gadsden, Alabama, and a like facility in Roanoke, Virginia. The three Gadsden QC employees were terminated on October 17. A series of events directly effected them leading up to the July 21 election.

I. *Events in the QC Department Before the Election*

1. Trottier interrogation

Wilson testified that prior to the election he and Supervisor Dale Trottier had a conversation about the union campaign. Trottier told Wilson that Taubman would close the DC and move it because it was his property and he could do pretty much what he wanted to do. Wilson exhibited a clear recollection of the event and was a credible witness. His testimony of this conversation was uncontroverted. Trottier's threats are found to be a violation of Section 8(a)(1) of the Act.

2. Fonner interrogation

Employees Nichols, Wilson, and Treckey testified on about July 18 they were interrogated by Supervisor Mark Fonner. In sum they recalled Fonner asked Nichols what her opinion of the Union was. Nichols told him that she preferred to keep her opinions to herself. The employees told him they would make their decision in the election. Fonner's testimony on this allegation was oblique. He stated that he handed out fact sheets concerning the Respondent's view of the union matter and asked employees if they had any questions. He did not directly deny the version of events related by the three QC employees. Under all the circumstances including the fact that the Respondent does not contend that it was aware of the union sympathies of these employees at the time the interrogation took place, it is found that Fonner's questioning them about their union sympathies is unlawful. The Respondent is found to have violated Section 8(a)(1) of the Act by such interrogation.

3. Jones' statements the day before the election

Nichols, Treckey, and Wilson also testified that they were confronted by Supervisor Darrell Jones on July 20, the day before the election. In sum, they recalled Jones saying he heard rumors that they were for the Union. Jones asked what they thought the problems were at the DC and he said the Respondent wanted to correct the problems. He insisted that Nichols list five things the Union could do for her. Nichols told him she preferred not to talk about the matter as she had chosen to remain neutral. Jones slammed his fist on a table and shouted that he did not want to lose his job. Nichols told him that she did not want to lose her job either. Nichols recalled Jones saying, "If you vote yes for the union, then Mr. Taubman will close this place down and you won't have a job and I won't have a job."

Jones admitted having a conversation with these employees. He was uncertain of the timing of the encounter but thought it was probably after the election. He remembered the employees saying that he did not know how they voted. Jones recalled that the employees felt as though they were being mistreated by "people" because they were union supporters. He said that if they would write down what their problems were, as a supervisor he would do the very best he could for the employees.

Considering the demeanor of the witnesses I credit the employees' version of the encounter. Each was impressive in their straightforward response to questions and lack of embellishment of their testimony. In contrast, Jones was not persuasive in his demeanor and he did not directly deny critical parts of the conversation attributed to him. I find that the Respondent did violate Section 8(a)(1) of the Act when Jones interrogated the QC employees about their union sympathies, threatened them with the loss of employment, solicited their grievances, and promised to remedy such grievances.

J. *Postelection Events Effecting the QC Department*

1. Changes in teamwork

No further unlawful conduct is alleged to have occurred after the July 21 election until October 9. The QC employees testified that on that October date they were approached by their supervisor, Mark Fonner, and told that henceforth they were not to work together. The QC employees had frequently assisted each other when they were inspecting orders. When the employees raised the question about lifting heavy items they recalled Fonner saying they should lift safely and wear their back support belts but they could not assist each other. Fonner testified that he told employees to work separately in order to get a broader report on the materials they checked. He denied telling these employees that they could no longer assist each other when working with heavy items.

Fonner's requirement of making the QC employees work separately was, of itself, not shown to be a more "onerous" working condition. The fact that the employees occasionally assisted each other with heavy items they were checking does lend itself to a finding that more burden was being placed on the individual workers. However, this event happened some 13 weeks after the election. The change in working conditions was reasonably explained as a desire for broader reporting than was being achieved. Although the change may have presented problems for the individual worker faced with occasional heavy loads the change was not sufficiently shown to be connected to the employees' union activities so as to find a violation of the Act.

2. Suspension of Greg Wilson

On October 11 the Respondent suspended Greg Wilson allegedly for talking to fellow employees during worktime. The Respondent presented testimony that on October 9 Wilson was observed to clock in after his lunch break and then sit back down in the break room and continue visiting with employees from the receiving department. A check of the clock revealed Wilson clocked in at 11:28 a.m. Supervisor Ellett was told to observe him and determine what time he left the breakroom. Ellett observed Wilson leave the breakroom at 11:36 a.m. Supervisor Mark Fonner investigated the matter and determined that Wilson had violated the Respondent's policy of visiting with friends on worktime and falsification of timecards. Fonner then issued a disciplinary notice and a 3-day suspension without pay to Wilson.

An issue was raised by Wilson that he did not sign the disciplinary notice (G.C. Exh. 8). However, Wilson conceded the paper contained his signature. I find regardless of the sig-

nature question, the fact is he was undeniably suspended for the 3 days and does not deny he was informed of the reasons for the Respondent's actions against him. The record shows that other employees have received similar discipline for like misconduct. In sum, it is concluded that the Government has not shown by a preponderance of the evidence that Wilson's suspension was motivated by his protected activities. His suspension is found not to be a violation of Section 8(a)(1) and (3) of the Act.

3. Discipline of Janice Treckey

October 13 disciplined Janice Treckey in relation to the alleged talking incident involving Kitchens which is discussed above. In sum, Treckey denied that she had any conversation with Kitchens. Fonner received the report from Supervisor Spraley and determined that Treckey should be disciplined. Treckey signed the disciplinary statement indicating the matter had been discussed with her. Gowens, the third employee involved in the incident, was not disciplined allegedly because he was continuing to work while talking.

Treckey was not shown to have had an extended conversation with the men. However, I do not find there is a sufficient nexus between this writeup and Treckey's union activities. I find that the Respondent did not violate Section 8(a)(1) and (3) of the Act by giving Treckey the written warning for talking on the job.

4. Terminations of Treckey, Nichols, and Wilson

The QC department was established in the spring of 1995 to check on some of the accuracy in the DC order filling process. It was anticipated at that time that the department would be expanded. However, as the results of various corporate checks were compared it became apparent that quality problems were not occurring at the points being checked by QC. A corporate decision was made that audit teams would be sent to stores and the problems would be traced back from that level. Additionally, it was determined that QC was no longer needed at the Gadsden DC or the Roanoke, Virginia warehouse.

On October 17 the Respondent announced to Nichols, Treckey, and Wilson that their QC jobs were being abolished. They were told the same decision was also being implemented at the Virginia location. The QC employees were offered continuing employment on at least a temporary basis implementing a reslotting project on the second shift. They had been working the first shift. They would receive a higher rate of pay for working second shift. Fonner explained that they would have no guarantee of continued employment after February but there was no other DC work available at that time. Fonner said that they would have to decide to accept the second-shift offers immediately or be terminated. Each had problems that caused them to reject the offer of second-shift work. Treckey had a terminally ill mother whom she looked after, Nichols did not want to make the drive to the DC at night, and Wilson was having his house reroofed and wanted to be there to oversee the work. As the QC employees did not accept the offer of continued employment they were terminated.

5. Analysis of QC department elimination

The Respondent asserts that the decision to remove the department was a valid business decision. The Government asserts the department consisted of union supporters and the elimination of the QC function was a pretext to rid the Respondent of these employees.

In first considering the foundational requisites of the *Wright Line* test the record shows that the QC employees did engage in union activity prior to the election. The Respondent is found to have knowledge of their union sympathies in particular by the remarks made by Supervisor Jones to them shortly before the election. As noted, Jones said he had heard they were in favor of the Union. Wilson also openly wore a union sticker. Additionally, at the commencement of the hearing the Respondent filed a motion to quash paragraph 2 of the Government's subpoena. This paragraph sought information concerning a February 1995 employee survey and a June 1995 task force meeting. I ruled that the items were potentially relevant and should be produced. The Respondent refused to comply. In considering the record as a whole, no adverse inference is drawn from the refusal to produce the February survey because I find that any such inference would be too speculative. The June task force meeting between management and employees was attended by both Wilson and Treckey. I conclude that if information concerning that meeting had been provided it would have been unfavorable to the Respondent's case. I draw the adverse inference that such information would have shown additional evidence that the Respondent had reason to believe that Wilson and Treckey were union supporters. *Auto Workers v. NLRB*, 459 F.2d 1329 (D.C. Cir. 1972).

As to the other *Wright Line* factors the Respondent's union animus is well documented above. The timing of the QC elimination is somewhat remote from the employees' union activities. Approximately 12 weeks passed after the election to the time that the QC department was terminated. However, I find that the elimination of the department was not so isolated in time as to insulate the act from consideration as a violation of the Act.

The Respondent asserts that the decision to eliminate the QC job was based on the determination that they no longer needed to review the accuracy of the pullers at the DC. The Respondent also eliminated the same job at its Virginia warehouse where six persons were effected. The three Gadsden employees were offered continued employment with the Respondent. None agreed to accept. Although the offer involved a temporary assignment and night work, the position also was higher paying. The Government's case did not refute the evidence that QC was eliminated because it was no longer useful for tracking orders. The Respondent's evidence that no other jobs were available for these employees was not rebutted. No evidence was presented that the QC employees were replaced after their terminations. In sum, the Government has not proven by a preponderance of the evidence that the elimination of the Gadsden QC department was a pretext or motivated in significant part by the QC employees' union activities. The Respondent is found not to have violated Section 8(a)(1) and (3) when the QC department was eliminated.

CONCLUSIONS OF LAW

1. Advance Auto Parts Distribution Center is an employer engaged in commerce within the meaning of Section 2(2), (6), and (7) of the Act.

2. United Steelworkers of America, AFL–CIO, CLC is a labor organization within the meaning of Section 2(5) of the Act.

3. The Respondent violated Section 8(a)(1) of the Act by engaging in the following conduct:

(a) Interrogating employees about their union sympathies or activities.

(b) Creating the impression of surveillance of its employees' union activities.

(c) Telling employees they could not distribute union literature or talk about the union on company time or property.

(d) Directing employees to remove union buttons they were wearing at work.

(e) Threatening employees that those who wore union buttons would be closely watched by supervision.

(f) Soliciting employees' grievances and promising to rectify such grievances if they vote against union representation.

(g) Threatening employees that it would close or move the facility and the employees would lose their jobs if the Union represented them.

(h) Threatening employees that it would not allow the Union to represent them.

(i) Requiring an employee to display an antiunion sign against her will and disparately preventing the employee from displaying a prounion sign.

4. The Respondent violated Section 8(a)(1) and (3) of the Act by discharging Genean Baker because of her union activities.

5. The foregoing unfair labor practices constitute unfair labor practices affecting commerce within the meaning of Section 2(6) and (7) of the Act.

6. The Respondent has not violated the Act except as specified.

THE REMEDY

Having found that the Respondent has engaged in certain unfair labor practices, I find it necessary to order it to cease and desist and to take certain affirmative action designed to effectuate the policies of the Act.

The Respondent, having discriminatorily terminated Genean Baker, must offer her reinstatement to her former position, without prejudice to her seniority or other rights and privileges or, if such position does not exist, to a substantially equivalent position, dismissing if necessary any employee hired to fill the position, and to make her whole for any loss of earnings and other benefits she may have suffered, computed on a quarterly basis, less any net interim earnings, as prescribed in *F. W. Woolworth Co.*, 90 NLRB 289 (1950), plus interest as computed in *New Horizons for the Retarded*, 283 NLRB 1173 (1987).

The Respondent shall expunge from its records all references to the unlawful discharge of Genean Baker and notify her in writing that this has been done, and that it will not rely on that discharge as a basis for future discipline of her.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended[6]

ORDER

The Respondent, Advance Auto Parts Distribution Center, Gadsden, Alabama, its officers, agents, successors, and assigns, shall

1. Cease and desist from

(a) Interrogating employees about their union sympathies or activities.

(b) Creating the impression of surveillance of its employees' union activities.

(c) Telling employees they could not distribute union literature or talk about the Union on company time or property.

(d) Directing employees to remove union buttons they were wearing at work.

(e) Threatening employees that those who wore union buttons would be closely watched by supervision.

(f) Soliciting employees' grievances and promising to rectify such grievances if they vote against union representation.

(g) Threatening employees that it would close or move the facility and the employees would lose their jobs if the Union represented them.

(h) Threatening employees that it would not allow the Union to represent them.

(i) Requiring an employee to display an antiunion sign against her will and disparately preventing the employee from displaying a prounion sign.

(j) Discharging employees for engaging in union activities.

(k) In any like or related manner interfering with, restraining, or coercing employees in the exercise of the rights guaranteed them by Section 7 of the Act.

2. Take the following affirmative action necessary to effectuate the policies of the Act.

(a) Within 14 days from the date of this Order, offer Genean Baker full reinstatement to her former job or, if that job no longer exists, to a substantially equivalent position, without prejudice to her seniority or any other rights or privileges previously enjoyed.

(b) Make Genean Baker whole for any loss of earnings and other benefits suffered as a result of the discrimination against her, in the manner set forth in the remedy section of this decision.

(c) Within 14 days from the date of this Order, remove from its files any reference to the unlawful discharge of Genean Baker, and within 3 days thereafter notify the employee in writing that this has been done and that the discharge will not be used against her in any way.

(d) Within 14 days after service by the Region, post at its facility in Gadsden, Alabama, copies of the attached notice marked "Appendix."[7] Copies of the notice, on forms provided by the Regional Director for Region 10, after being

[6] If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.

[7] If this Order is enforced by a judgment of a United States court of appeals, the words in the notice reading "Posted by Order of the National Labor Relations Board" shall read "Posted Pursuant to a Judgment of the United States Court of Appeals Enforcing an Order of the National Labor Relations Board."

signed by the Respondent's authorized representative, shall be posted by the Respondent immediately upon receipt and maintained for 60 consecutive days in conspicuous places including all places where notices to employees are customarily posted. Reasonable steps shall be taken by the Respondent to ensure that the notices are not altered, defaced, or covered by any other material. In the event that, during the pendency of these proceedings, the Respondent has gone out of business or closed the facility involved in these proceedings, the Respondent shall duplicate and mail, at its own expense, a copy of the notice to all current employees and former employees employed by the Respondent at any time since August 25, 1995.

(e) Within 21 days after service by the Region, file with the Regional Director a sworn certification of a responsible official on a form provided by the Region attesting to the steps that the Respondent has taken to comply.

IT IS FURTHER ORDERED that the complaint is dismissed insofar as it alleges violations of the Act not specifically found.